75-5714

In the

Supreme Court of the United States

OCTOBER TERM, 1975

CAROL SMITH SHANNON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

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The Petitioner, Carol Smith Shannon, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals of the Ninth Circuit entered in these proceedings on July 29, 1975, and the Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc rendered on September 15, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Ninth Circuit and its denial of rehearing are as yet unreported and appears at Appendix A and B **infra** pp. 12 and 21 .

The opinion of the United States District Court of the Southern District of California approving the Petitioner's application for injunctive relief is as yet unreported and appears at Appendix C **infra** p. 22 .

JURISDICTION

The judgment of the United States Court of Appeals of the Ninth Circuit was entered on July 29, 1975. A timely Petition for Rehearing and Suggestion For Rehearing En Banc was denied Petitioner on September 15, 1975.

This petition for certiorari is filed less than 90 days from the date of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (I).

QUESTION PRESENTED

The Petitioner filed an action to enjoin the collection of a jeopardy assessment against Petitioner as transferee.
The questions presented are:

1. Whether the Anti-Injunction Act (Section 7421 of the Internal Revenue Code of 1954) prevents the threshold determination of the status of an alleged transferee.

2. Whether allegations denying transferee status and arbitrary action require a hearing to determine the certainty of success before the bar of the Anti-Injunction Act is applicable.

3. Whether an alleged transferee may invoke the jurisdiction of Section 7426 of the Internal Revenue Code of 1954 to contest status of alleged transferee.

STATUTES INVOLVED

The pertinent provisions of Section 7421 and 7426 of the Internal Revenue Code of 1954 (26, United States Code) and Section 1346(e) (28, United States Code) are set forth in Appendix D, page 26 **infra.**

STATEMENT OF THE CASE

On August 1, 1973 a jeopardy assessment was made against taxpayer, C. Arnholt Smith in the amount of $22,833,933.02. On October 3, 1973 a notice of levy was served upon Petitioner as an alleged nominee, agent or transferee of Mr. Smith. The

notice of levy attached specifically to the alleged interest of Mr. Smith in property held by Petitioner in the amount of $478,366.35.

About October 19, 1973, a jeopardy transferee assessment was made in the amount of $2,645,329.35. A notice of levy was served and a lien filed against Petitioner's property in the County Recorder's office of San Diego County, State of California. The original assessment of $2,643,329.36 was subsequently reduced by the Respondent without explanation to $630,635.90 and on December 11, 1973 a statutory notice of deficiency as transferee in the amount of $630,635.90 was issued to Petitioner.

This case originated when Petitioner sought an injunction against enforcement of the levy and other relief by virtue of the jurisdiction authorized under 28 U.S.C. 1346(e) and 26 U.S.C. 7426, and that the action was arbitrary and capricious. The United States then moved for dismissal.

The district court granted the motion for a preliminary injunction and denied the government's motion to dismiss upon the conclusion that it had jurisdiction to hear this matter under Section 7426 and no further evidence was required at that point.

The court's opinion did not address itself specifically to the question of the application of the application of Section 7421 nor the effect of **Enochs v. Williams Packing Co.** 370 U.S. 1, other than to state as a conclusion that Section 7421 does not prohibit this action. However, at oral argument when the government was arguing under the **Enochs** decision as to the jurisdiction that all of the allegations in the complaint as to "transferee status" and "ownership of assests" were conclusions, the court indicated that the allegations in the complaint were "ultimate facts" and if true the Petitioner could prevail. In addition, the court concluded that the claim of ownership of property was sufficient grounds to state a claim for relief.

The Court of Appeals for the Ninth Circuit reversed and remanded the case with instructions to dismiss for lack of either Section 7426 jurisdiction or inherent equitable juris-

diction on the rational that Section 7426 does not allow "alleged transferees" to question their liability or the tax assessment, that Section 7421 does not statutorily allow for a threshold examination of the question of "transferee status", and that the **Enochs** exception to Section 7421 requires the Petitioner to show a complete lack of merit in the government's case regardless of arbitrary conduct by the government.

The Petition For Rehearing and Suggestion For Rehearing and Suggestion For Rehearing En Banc requested that the matter be remanded to the district court for additional evidence on the question of certainty of success and the arbitrary action of the government. Said petition was denied on September 15, 1975. (Appendix B, p. 21, **infra**).

REASONS FOR GRANTING THE WRIT

The granting of certiorari in this case would give the Court a further factual basis beyond the one presented by the presently pending **Shapiro v. Secretary of State** 499 F. 2d 527 (D.C. Cir., 1974) certiorari granted 420 U.S. 923 (No. 74-744, this term) in which to examine the significant and recurring problems concerning efforts to invoke federal jurisdiction despite the bar of the Anti-Injunction Act.

The Ninth Circuit opinion below reflects important statutory and policy considerations growing out of a bona fide effort to invoke jurisdiction.

The question of federal jurisdiction in this area is one of common if not increasing occurrence, and both the litigants and the courts urgently need the assistance of this Court in understanding the policies and the language of Section 7421 and 7426 of the Internal Revenue Code of 1954.

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO WHETHER THE STATUTORY APPLICATION OF SECTION 7421 (b) NECESSITATES AND ALLOWS FOR A THRESHOLD EXAMINATION OF THE QUESTION OF TRANSFEREE STATUS.

The Ninth Circuit in its opinion below did not construe Section 7421 to allow the district court jurisdiction to review the transferee status of one making sufficient allegations denying it. (Appendix A, p. 12, **infra**).

In so holding the Ninth Circuit decision conflicts squarely with the decisions adopted by the Second Circuit in **Botta v. Scanlon**, 288 F.2d 504 (2nd Cir., 1961), the Fifth Circuit in **Holland v. Nix** 214 F.2d 317 (5th Cir., 1954), and the Fourth Circuit in **Shelton v. Gill** 202 F.2d 503 (4th Cir., 1953).

In **Botta, supra**, the determination of that court to inquire into the status of an assessed individual is clearly and succinctly set forth in the language of the decision at page 508:

> However, a reasonable construction of the taxing status does not include vesting any tax official with absolute power of assessment against individuals not specifically in the statutes as persons liable for tax without an opportuinity for judicial review of the status before the appellation of "taxpayer" is bestowed upon them and their property is seized and sold. (Emphasis added).

In **Holland v. Nix, supra,** the court of appeals concluded the plaintiff was entitled to injunctive relief even though an assessment was directly made against him as a transferee of a transferee since the facts as pleaded (and admitted by virtue of defendant's motion to dismiss), revealed that the plantiff was not a transferee.

That the issue presented by the conflict is of importance is shown by the large number of circuits ruling on it. Furthermore, Justice Blackman in his dissenting opinion in **Alexander v. American United, Inc.** 416 U.S. 752, 767 discussed this problem indicating that he felt that:

> "In considering Sec. 7421 (a) a two-step analysis is necessary: (1) Where does the statute apply? (2) Where is it applicable under what circumstances is there an exception permitted? . . ."

The effect of foreclosing jurisdiction to one denying alleged transferee status is to allow the government the right to transform a third party (who has jurisdiction to bring an action

under Section 7426) into a transferee by mere assessment, and in doing give the government an arbitrary right to revoke the party's right to bring or continue in an action.

This conflict and its importance justify the granting of certiorari to review the judgement below.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE FACTUAL EVIDENCE NECESSARY TO OBTAIN A HEARING ON THE QUESTION OF "CERTAINTY" UNDER THE ANTI-INJUNCTION ACT.

The correctness of the decision below is open to serious question. The records show quite plainly and the district court found that the Petitioner clearly alleged that she was the true owner of the property and not a transferee.

The refusal of the court below to respect the allegations as true or to allow for the taking of further evidence cannot be justified. In **Jenkins v. McKeithen** 395 U.S. 411, at 421, this Court indicated that "[F] or the purpose of a motion to dismiss the material allegations of the complaint are taken as true."

The court below did not follow this Court's directive in **Enochs, supra,** that . . . "the question of whether the government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit." 370 U.S. 1,7.

Petitioner's allegations (taken as true for purposes of this suit) satisfy the **Enochs** prerequisites.

In reliance upon what it incorrectly conceived to be the principal established by the Court in **Enochs, supra,** and **Bob Jones University v. Simon** 416 U.S. 725, the Ninth Circuit held that the district court improperly granted an injunction and remanded the case for dismissal even though the district court's findings of facts concluded that the Petitioner claimed ownership of the assets and claimed no liability as a transferee. The Ninth Circuit felt that the record which was limited at the time of suit to the complaint and three affidavits did not meet the prerequisite "that the government had no chance of

success", the court citing the Sixth Circuit case of **Cole v. Cardoza** 441 F.2d 1337 (6th Cir., 1971) for support on this point. Similarily, in **James v. United States** 510 F.2d 860 (6th Cir., 1975) (per curiam) the Sixth Circuit rejected what it considered to be strictly conclusionary allegations in the complaint, and denied a taxpayer injunctive relief.

In so holding the Sixth and Ninth Circuits have adopted requirements for remand or dismissal that conflict with the requirements adopted by the Second Circuit in **Pizzarello v. U. S.** 408 F.2d 579 (2nd Cir., 1969), cert. denied 396 U.S. 986, and **Bauer v Foley** 404 F.2d 1215 (2nd Cir., 1968), the Third Circuit in **Sherman v. Nash** 488 F.2d 1081 (3rd Cir., 1973), the Fifth Circuit in **Lucia v. U.S.** 474 F.2d 565 (5th Cir., 1973) (en banc), and the Circuit Court of Appeal of the District of Columbia in **Shapiro, supra.**

This conflict in the holdings of the circuits is best illustrated by an examination of the issues involved. In **Bauer, supra, Shapiro, supra, Sherman, supra,** and **Lucia, supra,** the respective courts of appeals each remanded their cases back to the district courts with instructions to take evidence so that a fuller record is available for a proper determination as to whether or not a government assessment was arbitrary and excessive. In **Pizzarello, supra,** where the Internal Revenue Service had made a five-year projection of gambling income from a two-month study of the taxpayer's activities the court of appeal dismissed the government's case outright, finding its action clearly arbitrary.

In both **Pizzarello, supra,** and **Lucia, supra,** it was conceded that the taxpayer had been engaged in gambling; the respective courts of appeals involved still allowed jurisdiction to the taxpayer despite the fact that the only issue at question was the arbitrariness of the projection of gambling revenues made by the government. Similarily, the Court of Appeals for District of Columbia allowed jurisdiction to the taxpayer in **Shapiro, supra,** a case involving a more complicated dispute as to whether the taxpayer had in fact been engaged in the business of dealing in narcotics and further, what his income would have been from that business. Further, the court indicated

that the Anti-Injunction Act would not be violated by requiring evidence of the Government where the taxpayer denies such allegations.

In **Bauer, supra,** where the issue involved an allegation of forgery and coersion, the court remanded the case for trial concluding that an allegation of forgery was enough to throw into question the certainty of success of the Government.

In **Sherman, supra,** the Third Circuit affirmed the granting of an injunction and remanded the case to allow the district court to consider whether the assessments were intended to coerce the taxpayer for improper reasons unrelated to the collection of tax.

Contrastingly, in the case below where the Petitioner clearly alleged a set of facts under which the Internal Revenue Service could not prevail, the court of appeals did not allow the Petitioner jurisdiction and refused to remand the case back to the district court to take further evidence to substantiate the Petitioner's claim.

The facts in the case below (Appendix C, infra) shows an orginial levy was made on the Petitioner on October 3, 1973 in the amount of $478,366.35. About October 19, 1973 the jeopardy assessment and levy against the Petitioner suddenly jumped to $2,645,329.35. Finally on November 12, 1973, the Commissioner reduced the assessment to $630,635.90. At the time of filing the suit until the present time, no explanation has been given as to why in the short period of six weeks a claim can go from under $500,000 to more than $2,600,000 and back again to a little over $600,000. This maneuvering certainly brings into focus under the **Enochs** test the good faith of the government which the court of appeals in **Shapiro, supra,** indicated must be substantiated by facts other than the mere conclusive assertions by the United States.

The court below failed to rule affirmatively on the Petitioner's argument that this unexplained arbitrary conduct by the Commissioner supported another basis for a factual review of the Commissioner's actions, an improper conclusion in light of the opinions of the Second, Third, Fifth and

District of Columbia Circuits.

The failure of the lower court to accept the allegations of the complaint and conflicting court of appeal opinions justifies the granting of certiorari.

III. GRANTING CERTIORARI PRESENTS THE COURT WITH A FIRST IMPRESSION OPPORTUNITY TO DEFINITELY CONSTRUE THE NEW STATUTORY LANGUAGE OF SECTION 7426.

The court below held that Section 7426 denies jurisdiction to an alleged transferee due to the literal language of the section.

It is submitted that the decision of the lower court assumes a premise that is in fact the crucial issue of this case, namely whether the Petitioner is a transferee

Had the Petitioner filed suit after the initial levy on October 3, 1973 but before the jeopardy assessment on October 19, 1973, jurisdiction clearly would have existed under Section 7426 which issue is referred to by the lower court (Appendix A fn. 7 p. /6 infra) but not decided. Assuming this, must it follow that the Respondent could remove the jurisdictional grant of Section 7426 by unilaterally making a transferee assessment and moving for dismissal of the action. This clearly would not fulfill the intent of Congress and the remedial purpose of Section 7426.

The remedial purpose of Section 7426 was to protect third parties whose property is threatened with seizure for the liability of another and attempts to codify decisional law including **Botta v. Scanlon, supra, Holland v. Nix, supra,** and **Shelton v. Gill, supra.**

It is submitted that a person such as the Petitioner is within the group entitled to the protection of the courts under Section 7426 which protection should be safeguarded against the unilateral action of the Respondent of stealing that protection by the mere allegation of transferee status.

The conflict here is not one of judicial opinions between circuit courts but the conflict between the rights of private parties to their property and the unabridged unilateral interference of these rights by a governmental agency.

Given this conflict, and considering the importance of the Anti-Injunction Act in the administration of the tax system, the assistance of this Court is needed in understanding the policies and language of Section 7426, so as to provide for the proper functioning of the tax system balancing both the needs of the government for revenue and the rights of parties other than those primarily liable. A Supreme Court decision in this case will resolve questions whose importance extends far beyond the particular facts and parties here involved. Among the unanswered questions posed by the opinion below, are:

(1) Whether the language of Section 7426 . . . "any person (other than the person against whom is assessed the tax out of which such levy arose)" . . . permits action by persons denying their status of transferees. It is submitted that such action is permitted because no levy could be made against the Petitioner without an underlying assessment against the alleged transferor and it is the assessment of the transferor only that cannot be litigated.

(2) Whether Section 7426(c) only forecloses the challenge of the primary tax assessment and not the secondary and derivative ability of an alleged transferee. It is submitted that the prohibition is only against the primary assessment.

The court below answered both of the above questions in the negative. In light of the purpose behind the adoption of Section 7426, this Court should take this opportunity to correct the decision below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Ninth Circuit.

Respectfully submitted,

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Date: October 13, 1975

APPENDIX A

United States Court of Appeals for Ninth Circuit
No. 74-1922 July 29, 1975

Carol Smith Shannon,
Plaintiff-Appelle

v.

United States of America
Defendant-Appellant

Opinion and Judgement Order.

Before: TUTTLE*, HUFSTEDLER and WRIGHT,
Circuit Judges

WRIGHT, Circuit Judge:

The government appeals from two orders by which the district court (1) denied the defendant's motion to dismiss for lack of jurisdiction and (2) granted a preliminary injunction against the Internal Revenue Service (IRS) enjoining the enforcement of a levy against Shannon's assets. This court has jurisdiction under 28 U.S.C. § 1292 (a) (1). [1]

FACTS

On August 1, 1973 a jeopardy assessment was made against C. Arnholt Smith for over $22.8 million for unpaid 1969 income taxes. On October 3 of that year a notice of levy was served upon Carol Smith Shannon, appellee, as the alleged nominee, agent, or transferee of Mr. Smith.

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*Senior Circuit Judge for the Fifth Circuit.

[1] "It is also established that an appeal from an order granting a preliminary injunction supports a review of an order denying a motion to dismiss, even though standing alone the latter would not be appealable." **Genosick v. Richmond Unified School District**, 479 F.2d 482, 483 (9th Cir. 1973); 9 **Moore**, Federal Practice section 110.25 [1].

The notice of levy for approximately $23.3 million sought to attach all of Smith's interest in $478,366.35 allegedly withdrawn by Shannon from an account in the United California Bank about August 3, 1973.

About October 19, 1973, pursuant to 26 U.S.C. § §6861 (a) and 6901 (I.R.C. 1954), [2] a jeopardy transferee assessment was made against Shannon for over $2.6 million, a notice of levy was served and a lien filed against Shannon's property in the county recorder's office. The amount of the transferee assessment was later reduced to $630,635.90 and on December 11 a statutory notice of deficiency in the amount of the transferee assessment was issued to Shannon.

She then sought an injunction against the enforcement of the levy and other relief. The United States, appellant, moved for dismissal. The district court denied the motion to dismiss and granted the preliminary injunction pending a determination of the action on its merits.

ISSUES

(1) Did the district court have jurisdiction under 28 U.S.C. §1346 (e)?

(2) If not, did the district court have jurisdiction on any other basis? We answer both questions in the negative.

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[2] §6901 in pertinent part provides

"(a) The amounts of the following liabilities shall . . . be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

. . . .

(A) Transferees.—The liability, at law or in equity, of

DISCUSSION

The provisions of 26 U.S.C. § 7421 (I.R.C. 1954) provide the backdrop against which both issues must be discussed.[3] Section 7421 not only prohibits suits to restrain the assessment or collection of a tax, but also prevents the district court from granting such equitable relief. **Enochs v. Williams Packing Co.**, 370 U.S. 1, 5 (1962). Unless one seeking to enjoin the IRS brings herself within a statutory or judicially-created exception to §7421, the district court has no jurisdiction and the suit for injunction is barred. 370 U.S. at 7.

The district court based jurisdiction on 28 U.S.C. §1346 (e), the jurisdictional counterpart of U.S.C. §7426 (I.R.C. 1954). Applicable provisions of §7426 give a civil action against the United States to third persons whose assets have been wrongfully levied against by the IRS.[4]

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a transferee of property–

(i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes.)"

3 Applicable portions of §7421 provide:

"(a) **Tax.**–Except as provided in section . . . 7426 (a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

"(b) **Liability of transferee** . . . . –No suit shall be maintained in any court for the purpose of restraining the assessment or collection . . . of–

(1)the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax . . . ."

4 The applicable portions of §7426 provide

Shannon argues that despite being assessed as a transferee she comes within the provisions of §7426 and the district court thus has jurisdiction under §1346(e). She reasons that: the prohibition of §7421(b) (1) applies only to an actual transferee; the IRS was wrong in assessing her as such and the district court should therefore find that she is not a transferee; and once found not to be a transferee the injunction should be granted under §7421 (a) with its § 7426 exception. [5]

The fatal flaw in this analysis is that it fails to take into account the literal language of §7426. Clearly, the section was not intended for those assessed as transferees.

First, the §7426 remedies are denied to "the person against whom is assessed the tax out of which such levy arose."[6] The undeniable fact is that the October 19 jeopardy transferee assessment was made against Shannon herself. That assessment is the one out of which the levy arose.

"(a) **Actions permitted.**–

(1) **Wrongful levy.**– If a levy has been made on property . . . any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in . . . such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States.

"(b) **Adjudication.** – The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) **Injunction.** If a levy . . . would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy . . . ."

5 Since the district court did not find that Shannon was not a transferee, there was no §1346(e) jurisdiction even under Shannon's reasoning.

6 **See** note 4, **supra.**

Shannon argues that it is Smith, not she, contemplated by § 7426 when it speaks of "the person against whom is assessed the tax . . . ." This may have been true at the time of the first levy (October3).[7] It certainly was not true of the second (October 23), made after she was assessed in her own right as a transferee. One who has been assessed as a transferee cannot argue that the assessment was not made against her.

Second, one who sues under § 7426 cannot challenge the validity of the assessment. 26 U.S.C. § 7426(c) (I.R.C. 1954).[8] Shannon sought to enjoin the levy as wrongful under § 7426 because she was "not the transferee of C. Arnholt Smith," i.e., she had been improperly assessed as such. She was thus challenging the validity of the transferee assessment which is foreclosed by § 7426(c).[9]

Finally, legislative history indicates that it was not the intent of Congress to make § 7426 available to persons

assessed as transferees.[10]

Our decision does not leave Shannon without a remedy. On the contrary, a transferee has available the same avenues as a taxpayer who seeks judicial review to challenge the government's collection efforts against him. She may bring a refund suit in district court or a petition to the Tax Court for a redetermination of the deficiency. **Philips v. Commissioner,** 283 U.S. 589,597-598 (1931).

Having decided that § 7426 is not available to a transferee, we conclude that the district court did not have jurisdiction

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7 We do not decide whether Shannon could have brought her § 7426 action at that time. Shannon argues that she could have and, assuming that fact, argues that the IRS should not be allowed to destroy the § 7426 remedies by "utilizing the mechanical . . . provisions of § 6901." This ignores the fact the section was intended for the relatively "remedyless" third person, not for transferees who have the same remedies as taxpayers. **See** note 9, **infra.**

8 § 7426:

"(c) **Validity of the Assessment.**— For purposes of an adjudication under this section, the assessment of tax upon which the . . . lien of the United States is based shall be conclusively presumed to be valid."

9 **Cf. Kirtley v. Bickerstaff,** 488 F.2d 768,770 (10th Cir. 1973), **cert. denied** 419 U.S. 828 (1974); **Enterprises Unlimited v. Davis,** 340 F.2d 472, 474 (9th Cir. 1965). Although the parties assessed in these cases were primarily liable (appellee here is only secondarily liable), the common element is that they were in fact assessed as individuals. Both cases held that once the assessment is made, the individual assessed is barred from challenging the validity of the assessment.

10 Section 7426 was added to the Internal Revenue Code of 1954 by the Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1142, Sec. 110(a). Prior to that, the United States could not be sued by third persons where its collection activities interfered with third party property rights. This included the situation where the government wrongfully levied upon the property of a third person in an attempt to collect from a taxpayer. H. Rep. No. 1884, 89th Cong., 2d Sess., p.27 (1966-2 Cum. Bull. 815, 834). As stated by the Committee Report, it was for this reason, **inter alia,** that the bill provided for wrongful levy actions brought by nontaxpayers. H Rep.

No. 1884, **supra**, p. 28 (1966-2 Cum. Bull., **supra**, p. 834). Clearly the act was not meant to apply to suits by those assessed as transferees. They already had two avenues of judicial review at the time the Act was passed. **Phillips v. Commissioner**, 283 U.S. 589, 597-598 (1931).

We note that Section 110 (c) of Federal Tax Lien Act of 1966, **supra**, amended § 7421(a) of the Internal Revenue Code of 1954 by adding a proviso that the § 7421(a) prohibition on suits to restrain the assessment or collection of any tax did not apply to actions under § 7426(a) and (b) (1). No similar amendment was made to § 7421(b) prohibiting transferee injunction suits (**see** note 2, **supra**), clear evidence that Congress did not intend that § 7426(a) would be available to transferees.

That latter section was developed by Congress in cooperation with the American Bar Association's Special Committee on Federal Tax Liens. House Hearings before the Committee of Ways and Means on Priority of Federal Tax Liens and Levies, 89th Congress, 2d Sess., pp. 64-65. The Final Report of that Committee had a provision (§ 7431) similar to § 7426(a). Hearings, **supra**, p. 159. The Final Report (Hearings, **supra**, p. 192) said:

> "* * * [This provision was] intended to codify the procedural rights of third parties whose property is seized or threatened with seizure for the tax liabilities of another. It has no application to the rights of the person against whom as assessment is made, whether as taxpayer, **transferee**, or otherwise. **Procedures available to such persons are provided by existing provisions of the Code.**" (Emphasis added.)

We find nothing in the entire legislative history of § 7426 which would indicate that this concept of the statute was ever rejected.

under § 1346(e).[11]

Since § 1346(e) did not confer jurisdiction on the district court in the circumstances of this case, it did not have jurisdiction to entertain this action unless the bar of § 7421(b) was inapplicable.[12] However, that section is applicable unless the plaintiff establishes two factors: (1) certainty of success on the merits and (2) irreparable injury. (**Bob Jones University v. Simon**, 416 U.S. 725,737 (1974); **see also Enochs v. Williams Packing Co.**, 370 U.S. 1 (1962); **Miller v. Standard Nut Margarine**, 284 U.S. 498 (1932); **Westgate-California Corp. v. United States**, 496 F.2d 839, 842-43 (9th Cir. 1974).[13] Shannon failed to establish certainty of success on the merits.

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[11] Jurisdiction was not alleged under 28 U.S.C. § 1340 ("actions arising under an Act of Congress providing for the internal revenue").

[12] "The courts, moreover, have uniformly held that the proscription of Section 7421 applies to suits to restrain the collection of jeopardy assessments as well as to ordinary assessments."
Transport Manufacturing & Equipment Co. of Del. v. Trainor, 382 F.2d 793, 797 (8th Cir. 1967) and the cases collected there.

[13] These cases dealt with § 7421(a) and its predecessor, § 3224 Rev. Stat. However, since the enactment of § 7421(b) "the courts have treated requests for injunctions in transferee cases in the same fashion as in cases involving the original taxpayers, and subject to the same exception regarding extraordinary cicumstances. . . ." [Footnotes omitted.] 9 **Mertens**, Law of Federal Income Taxation (1971 Revision) § 49.210 (p. 394).

When the district court granted the preliminary injunction the record was limited to the complaint and three unilluminating affidavits. Shannon's complaint made a number of conclusory allegations (**e.g.**, that "she is not the transferee of [Smith]" and that she is "the true owner of all assets levied upon by Defendant") which were neither supported by any factual allegation nor established by any factual allegation nor established by any evidence.

This was insufficient to meet the stringent **Miller-Enochs-Bob Jones** test. The burden of proof was on the plaintiff (**Westgate, supra,** at 843) and was not met by mere bald assertions. **See, e.g., Cole v. Cardoza**, 441 F.2d 1337, 1341-1342 (6th Cir. 1971), **Collins v Daly**, 437 F.2d 736, 739 (7th Cir. 1971), **Williams v Wiseman**, 333 F.2d 810, 811 (10th Cir. 1964), and **Cooper Agency, Inc. v. McLeod**, 235 F. Supp. 276, 284 (E.D.S.C. 1964, aff'd **per curiam** 348 F.2d 919 (4th Cir. 1965) (complaint alleged that plaintiffs were not transferees because at no time were transfers made without full, fair, and adequate consideration). Thus, the court could not have inferred a complete lack of merit in the government's case. [14]

Because Shannon did not establish certainty of success on the merits, we need not inquire whether she established irreparable injury.[15] **U.S. v. American Friends Service Com.**, 419 U.S. 7, 10 (1974).

Shannon did not demonstrate that the district court had jurisdiction and the motion to dismiss should have been granted. The order granting the preliminary injunction is reversed and the cause is remanded to the district court to dismiss the complaint for want of jurisdiction.

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[14] The district court did not find that the government could not ultimately prevail on the merits.

[15] The district court found that Shannon would suffer irreparable harm for which she had no adequate legal remedy. This was based on her allegations that the assessment and levy had the effect of freezing her assets so that she could not meet current obligations and of severely damaging her credit rating.

APPENDIX B

United States Court of Appeals for Ninth Circuit
No. 74-1922 September 15, 1975

Carol Smith Shannon,
Plaintiff-Appellee

v.

United States of America
Defendant-Appellant

Opinion: Denial of Rehearing and Suggestion for Rehearing En Banc

Before: TUTTLE, HUFSTEDLER and WRIGHT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hufstedler and Wright have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

United States District Court, Southern District of California
No. 73-526 February 13, 1974

Carol Smith Shannon,
Plaintiff,

v.

United States of America,
Defendant.

Opinion and Judgement

The above-entitled matter having come on regularly for hearing on the motion of the plaintiff for a preliminary injunction pending hearing on the merits of plaintiff's complaint and on the motion of defendant United States of America to dismiss the complaint on the basis that:

a) The Court lacked jurisdiction over the subject matter;
b) The Court lacked jurisdiction over the defendant, and;
c) That the complaint failed to state a claim from which relief can be granted.

The same came on for hearing on the 15th day of January, 1974 before the Honorable Leland C. Nielsen, United States District Judge presiding. The plaintiff, Carol Smith Shannon, appearing by her attorneys William P. Shannahan and David R. Thompson, and the defendant, United States of America, appearing by its attorneys Stephen G. Fuerth, United States Department of Justice, and Robert H. Filsinger, Assistant United States Attorney; the matter having been argued orally and upon written memoranada, the Court having considered the complaint herein and the affidavits filed February 1, 1974 in support of the motion hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On August 3, 1973, the Department of the Treasury, Internal Revenue Serivce, served a Notice of Levy for the year of 1969 on the assets of C. Arnholt Smith in the amount of Twenty-Two Million, Eight Hundred Thirty-Three Thousand, Nine Hundred Thirty-Three Dollars and Two Cents ($22,833,933.02) allegedly pursuant to the jeopardy assessment provisions of Title 26, U.S.C. §6861. There is now pending before this Court a complaint by C. Arnholt Smith, being Civil No. 73-320-N, contesting the propriety of said levy.

2. On or about October 3, 1973 the Department of the Treasury, Internal Revenue Service, served a notice of levy upon the plaintiff as alleged nominee, agent or transferee of C. Arnholt Smith in the amount of Twenty-Three Million, Two Hundred Fifty-Six Thousand, Four Hundred Fourteen Dollars and Seventy-Eight Cents ($23,256,414.78) allegedly attaching to the sum of Four Hundred Seventy-Eight Thousand, Three Hundred Sixty-Six Dollars and Thirty-Five Cents ($478,366.35).

3. On October 17, 1973 a notice of levy was served on plaintiff's attorney in the amount of Three Hundred Thousand Dollars ($300,000.00) which sum was in his possession.

4. On October 23, 1973 the Department of the Treasury, Internal Revenue Service, served a notice of levy upon the assets of the plaintiff as transferee of C. Arnholt Smith in the amount of Two Million, Six Hundred Forty-Five Thousand, Three Hundred Twenty-Nine Dollars and Thirty Five Cetns ($2,645,329.35) and filed a lien against plaintiff's property on October 23, 1973 in the Office of the County Recorder, County of San Diego, State of California.

5. On November 12, 1973 the Department of the Treasury, Internal Revenue Service, reduced the assessment on the plaintiff from the sum of Two Million, Six Hundred Forty-Five Thousand, Three Hundred Twenty-Nine Dollars and Thirty-Five Cents ($2,645,329.35), to Six Hundred Thirty Thousand, Six Hundred Thirty-Five Dollars and Ninety Cents ($630,635.90).

6. On December 7, 1973 final demand was made upon plaintiff's attorney pursuant to the levy served upon him on October 17, 1973.

7. On December 11, 1973 a statutory notice of deficiency with respect to the jeopardy assessment made on October 19, 1973 was issued to the plaintiff in the amount of Six Hundred Thirty Thousand, Six Hundred Thirty-Five Dollars and Ninety Cents ($630,635.90).

8. The plaintiff claims ownership to all of the assets levied upon by the defendant and further claims that plaintiff is not liable for any of the tax liability of C. Arnholt Smith.

9. Plaintiff has no plain, speedy and adequate remedy at law. The enforcement of the levy against the assets of the plaintiff prior to a proper hearing by this Court will affect her property rights, which action will result in irreparable injury to the plaintiff's rights and property in which she claims to have a superior interest to that of the defendant.

10. The claim of the plaintiff that she is the owner of the property levied on and that the levy by the defendant is wrongful is sufficient grounds to state a claim upon which relief can be granted.

11. The granting of a preliminary injunction is necessary to preserve the status quo until the merits of the case can be decided.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action under 26 U.S.C. § 7426 and 28 U.S.C. § 1346(e).

2. 26 U.S.C. § 7421 does not prohibit this action:

3. 28 U.S.C. § 2201 may not apply to this action in that § 2201 appears on its face to only apply to suits by the taxpayer and not actions by third parties.

4. 28 U.S.C. § 2410 wherein the United States may be named a party in an action to quiet title to real and personal property is a waiver of sovereign immunity.

5. Plaintiff is entitled to a preliminary injunction restraining the defendant from enforcing any levy against the assets of the plaintiff or attaching or otherwise seizing the assets of

the plaintiff until this action can be heard and determined on its merits.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED:

1. Defendant's motion to dismiss is hereby denied.

2. Plaintiff's motion for a preliminary injunction is hereby granted.

3. IT IS FURTHER ORDERED that defendant United States of America and its agents and employees, attorneys and all persons acting in concert or in participation with them be and are hereby restrained from in any manner, either directly or indirectly, enforcing any levy against the assets of the plaintiff or attaching or otherwise seizing in any manner the assets of the plaintiff pending the final hearing and the termination of this action.

4. IT IS FURTHER ORDERED that all third parties against whom notices of levy have been filed concerning the assets of the plaintiff shall retain possession of said assets pending further order of this Court.

5. IT IS FURTHER ORDERED that the sum of Three Hundred Thousand Dollars ($300,000.00) held by plaintiff's attorney may be invested by said attorney in a savings account or a certificate of deposit in a bank or savings and loan association, in governmental obligations or similar investments, and that the income from said investment shall be paid in to the registry of this Court.

6. IT IS FURTHER ORDERED that an injunction bond of the plaintiff in the amount of One Thousand Dollars ($1,000.00) be hereby approved.

Dated: February 13, 1974

LELAND C. NIELSEN,
United States District Judge

APPENDIX D

Statutes Involved

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125]. Tax.--Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) **Liability of Transferee or Fiduciary.** --No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of --

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (31 U.S.C. 192) in respect of any such tax.

SEC. 7426 [as added by Sec. 110(a), Federal Tax Lien Act of 1966, **supra**]. CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS.

(a) **Actions Permitted.**--

(1) **Wrongful Levy.**-- If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the secretary or his delegate.

(2) **Surplus Proceeds.** -- If property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale may bring a civil action against the United States in a district court of the United States.

(3) **Substituted Sale Proceeds.** -- If property has been sold pursuant to an agreement described in section 6325 (b) (3) (relating to substitution of proceeds of sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in a district court of the United States.

(b) **Adjudication.** -- The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) **Injunction.** -- If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) **Recovery of Property.** -- If the court determines that such property has been wrongfully levied upon, the court may --

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgement for the amount of money levied upon; or

(C) grant a judgement for an amount not exceeding the amount received by the United States from the sale of such property.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum

price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(3) **Surplus Proceeds.** -- If the court determines that the interest or lien of any party to an action under this section was transferred to the proceeds of a sale of such property, the court may grant a judgement in an amount equal to all or any part of the amount of the surplus proceeds of such sale.

(4) **Substituted Sale Proceeds.** -- If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325 (b) (3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

(c) **Validity of Assessment.** -- For purpose of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid.

(d) **Limitation on Rights of Action.** -- No action may be maintained against any officer or employee of the United States (or former officer or employee) or his personal representative with respect to any acts for which an action could be maintained under this section.

(e) **Substitution of United States as Party.** -- If an action, which could be brought against the United States under this section, is improperly brought against any officer or employee of the United States (or former officer or employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action was commenced upon proper service of process on the United States.

28U.S.C.:

§ 1346 United States as defendant.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 of the Internal Revenue Code of 1954.

No. 75-571

In the Supreme Court of the United States

OCTOBER TERM, 1975

CAROL SMITH SHANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

In the Supreme Court of the United States

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CAROL SMITH SHANNON, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 1, 1973, the Commissioner of Internal Revenue made a jeopardy assessment of income taxes for the year 1969 of $22,833,933.02 against C. Arnholt Smith, in accordance with Section 6861 of the Internal Revenue Code of 1954 (I-R. 5, 16).[1] On October 3, 1973, the Commissioner served a notice of levy upon petitioner, the daughter of C. Arnholt

[1] "R." references are to the record appendix filed in the court of appeals.

Smith, as his nominee, agent, or transferee. The notice of levy was for $23,256,414.78, and specifically sought to attach all of C. Arnholt Smith's interest in $478,366.35, which petitioner allegedly had withdrawn on August 3, 1973, from an account in the United California Bank (I-R. 5, 79).

On October 19, 1973, pursuant to the provisions of Sections 6861(a) and 6901(a)(1)(A)(i) of the Code, the Commissioner made a $2,645,329.35 jeopardy assessment against petitioner as transferee of C. Arnholt Smith (I-R. 17). The Commissioner then served a notice of levy upon the assets of petitioner and filed a lien in the Office of the County Recorder for the County of San Diego, California (I-R. 79-80). After making final demand for payment, the Commissioner issued to petitioner a statutory notice of deficiency of $630,635.90, pursuant to Sections 6212 and 6861(b) of the Code (I-R. 17, 80).[2]

Petitioner thereupon instituted this suit in the United States District Court for the Southern District of California. She sought an injunction against the enforcement of the levy, a declaration that the Internal Revenue Service had wrongfully levied upon her property, a return of her property free of any levy, a declaration that she was not the transferee of her father, C. Arnholt Smith, and the voiding of the jeopardy assessment on the ground that it was an abuse of discretion (I-R. 1-5). In her complaint,

[2] The assessment had been reduced to this figure on November 12, 1973 (I-R. 80).

petitioner alleged, *inter alia*, that (1) she was the true owner of all the assets levied upon by the Internal Revenue Service; (2) she was not a transferee of C. Arnholt Smith; (3) C. Arnholt Smith was not insolvent at the time of any alleged transfer to her; (4) the jeopardy assessment and levy was arbitrary, capricious and an abuse of discretion and caused her irreparable injury (I-R. 3-4).

The government moved to dismiss the complaint, asserting that (1) the suit was barred by the Anti-Injunction Act, 26 U.S.C. 7421; (2) the suit was barred by sovereign immunity; and (3) the complaint failed to state a claim upon which relief could be granted (I-R. 14). After hearing argument, the district court denied the motion to dismiss and granted a preliminary injunction against the enforcement of any levy pending final hearing and determination. The court held, *inter alia*, that 26 U.S.C. 7421 did not bar the action (I-R. 48; II-R. 42-43).

The court of appeals reversed and remanded the case to the district court with directions to dismiss the complaint for lack of jurisdiction (Pet. App. A 12-20). It held that petitioner could not avoid the jurisdictional bar of 26 U.S.C. 7421(b)(1) because she had not established that under no circumstances could the government prevail on the merits of its claim in accordance with this Court's decision in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1.

1. 26 U.S.C. 7421(b)(1) prohibits all suits seeking to restrain "the assessment or collection * * * of

the amount of the liability * * * of a transferee of property of a taxpayer in respect of any internal revenue tax." Petitioner asserts (Pet. 4-6) that the court of appeals erred in holding that Section 7421 (b)(1) barred the district court from considering whether she was a transferee under Section 6901 of the Internal Revenue Code. But the court of appeals did not so hold; it simply concluded that petitioner failed to establish that she was not a transferee (Pet. App. A20).[3]

Thus, contrary to petitioner's argument (Pet. 4-6), the decision below does not conflict with either *Shelton* v. *Gill*, 202 F.2d 503 (C.A. 4), or *Botta* v. *Scanlon*, 288 F.2d 504 (C.A. 2). Unlike this case, the plaintiffs in *Shelton* presented specific evidence which demonstrated that they were not transferees. In *Botta*, the court merely accorded the plaintiffs an opportunity to amend their complaint "to allege facts showing that Section 7421 is inapplicable to them" (288 F.2d at 508).[4]

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[3] Petitioner also asserts (Pet. 5-6) that the government can, by labelling one as a transferee, "revoke the party's right to bring or continue in an action." But it has long been established that, as the court of appeals correctly recognized (Pet. App. A 17), a person assessed as a transferee may petition the Tax Court for a redetermination or pay the tax and sue for a refund. See *Phillips* v. *Commissioner*, 283 U.S. 589, 597-598.

[4] On a second appeal in *Botta* v. *Scanlon*, 314 F.2d 392, 394, the court noted that "[s]ince the assessments here were made against the appellants, their reference to cases in which the government sought to satisfy the tax obligation of one out of the property of another * * * are inapposite."

At all events, the authority of *Shelton* v. *Gill*, *supra*, and *Holland* v. *Nix*, 214 F.2d 317 (C.A. 5) (Pet. 5, 9), both of which relied upon *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, has been undermined by this Court's subsequent decision in *Enochs* v. *Williams Packing Co.*, *supra*, 370 U.S. at 7. There, the Court held that an injunctive suit against the assessment or collection of a tax was barred by 26 U.S.C. 7421 unless it was "apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim" and equity jurisdiction otherwise exists. As the Court recently stated in *Bob Jones University* v. *Simon*, 416 U.S. 725, 737, 744-745, *Williams Packing* gave literal effect to Anti-Injunction Act and "rehabilitate[d] the Act following [the] debilitating departures from its explicit language" in *Miller* v. *Standard Nut Margarine Co.*, *supra*.

2. The court of appeals correctly concluded that petitioner did not meet the *Williams Packing* test of showing that under no circumstances could the government prevail on the merits of its claim. As it observed (Pet. App. A 20), when the district court granted the preliminary injunction, the record was limited to the complaint and "three unilluminating affidavits". Thus, there was no evidentiary support or even any factual allegation for any of the conclusory allegations in petitioner's complaint that she was not a transferee nor the owner of the assets subjected to the levy.

Nothing in any of the decisions cited by petitioner (Pet. 6-9) is to the contrary. Unlike the taxpayers in *Pizzarello* v. *United States*, 408 F.2d 579 (C.A. 2), and *Lucia* v. *United States*, 474 F.2d 565 (C.A. 5) (*en banc*), petitioner has not shown that the transferee liability assessment against her is without any foundation.

In *Pizzarello*, the Second Circuit relied upon *Williams Packing* in reversing the denial of an injunction against a gambling excise tax assessment which was based upon a five-year projection of wagering activity. That case, however, is distinguishable. There, the taxpayer had been indicted for operating a gambling establishment for two weeks. Because of this obvious disparity in the time periods, the court found "no proof in the record * * * that Pizzarello operated as a gambler for five years or that, even if he did so operate, his three-day average * * * represented his average daily business for the other 1,575 days" (408 F.2d at 583). In determining the assessment to be excessive, the court noted that the Commissioner's determination that the taxpayer was engaged in gambling activity for five years was "unsupported either by the record or by affidavits" (*id.* at 584).[5]

[5] Compare, however, *Hamilton* v. *United States*, 309 F. Supp. 468 (S.D. N.Y.), affirmed *per curiam*, 429 F.2d 427, certiorari denied, 401 U.S. 913, where the Second Circuit more recently affirmed the district court's denial of an injunction, although the assessment for wagering taxes, based on records covering three days, was projected over almost four years.

Lucia similarly involved a gambling excise tax assessment based upon a projection of wagering activity. But unlike petitioner, the taxpayer in *Lucia* argued on appeal that he could demonstrate the error in the projection employed by the government. In remanding the case to the district court for a factual determination of the taxpayer's allegation that the assessment was without foundation, the Fifth Circuit explicitly stated that "the taxpayer, Lucia, will have to prove his case upon remand, and the extent of our holding goes no further than to give him that opportunity" (474 F.2d at 575; footnote omitted). Thus, in conformity with the decision below, *Lucia* squarely places the burden of meeting the first aspect of the *Williams Packing* test—that the assessment is without any foundation—upon the taxpayer.[6]

Moreover, the decision below does not conflict with *Shapiro* v. *Secretary of State*, 499 F.2d 527 (C.A. D.C.), certiorari granted *sub nom. Commissioner* v. *Shapiro*, 420 U.S. 923, argued November 5, 1975, No. 74-744. Here, as we have pointed out, the court of appeals stated that petitioner's conclusory allegations in her complaint "were neither supported by

[6] *Sherman* v. *Nash*, 488 F.2d 1081 (C.A. 3), relied upon by petitioner (Pet. 7), is also distinguishable. There, the court of appeals remanded an injunctive suit to the district court to consider whether the assessments were intended to coerce the taxpayers for a purpose unrelated to the collection of taxes. Similarly, in *Bauer* v. *Foley*, 404 F.2d 1215 (C.A. 2) (Pet. 7), the court remanded the case to the district court to allow the taxpayer to supplement the evidence showing that her signature was forged on a joint return.

any factual allegation nor established by any evidence" (Pet. App. A 20). Thus, this case does not raise the question presented in *Shapiro*, *i.e.*, whether the Commissioner is required to prove his good faith and the facts upon which a tax assessment is based to meet the factual allegations on the taxpayer's complaint before the bar of the Anti-Injunction Act is applicable. While we believe that *Shapiro* erred in holding that the Commissioner had to prove the facts upon which the assessment was based, petitioner's failure to present any factual challenge to the assessment confirms the correctness of the court of appeals' conclusion that she did not meet the *Williams Packing* test of showing that under no circumstances would the government prevail on the merits of its claim.

3. Finally, petitioner argues (Pet. 10) that "the assistance of this Court is needed in understanding the policies and language of Section 7426, so as to provide for the proper functioning of the tax system balancing both the needs of the government for revenue and the rights of parties other than those primarily liable" and that a "decision in this case will resolve questions whose importance extends far beyond the particular facts and parties here involved." Acknowledging that the question of the applicability of Section 7426 to a transferee liability case is one of "first impression" (Pet. 9), petitioner urges that the court of appeals erred in concluding that Section 7426(a)(1) was not available to one subject to an assessment of transferee liability.

Section 7426 provides that where a levy has been made on property, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States seeking, *inter alia*, an injunction to prohibit the enforcement of the levy. The court of appeals correctly concluded that Section 7426(a)(1) specifically excludes from its coverage any "person against whom is assessed the tax out of which such levy arose."

Here, the levy of which petitioner complains arose out of the transferee assessment assessed against her so that Section 7426(a)(1) is not applicable. Moreover, Section 7426(c) provides that "[f]or purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid." The assessment of tax upon which the interest of the United States vis-a-vis petitioner is based is the transferee assessment. Thus, her claim that she is not a transferee challenges the validity of the assessment and, accordingly, is precluded by Section 7426(c).[7]

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[7] Section 7426 was developed by Congress in cooperation with the American Bar Association's Committee on Federal Liens (Hearings on H.R. 11256 and H.R. 11290 (Priority of Federal Tax Liens and Levies) before the House Committee on Ways and Means, 89th Cong., 2d Sess., pp. 64-65 (1966)). The Final Report of that Committee had a provision (Sec.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

7431) which was similar to Section 7426(a) (Hearings, *supra*, at p. 159). The Final Report said (Hearings, *supra*, at p. 192):

> * * * [This provision was] intended to codify the procedural rights of third parties whose property is seized or threatened with seizure for the tax liabilities of another. It has no application to the rights of the person against whom an assessment is made, whether as taxpayer, *transferee* or otherwise. *Procedures available to such persons are provided by existing provisions of the Code.* [Emphasis added.]

There is nothing in the legislative history of Section 7426 which indicates that this concept of the statute was ever rejected.

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